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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ANDREA G.,  
a Person Coming Under the Juvenile Court Law.

B196735  
(Los Angeles County  
Super. Ct. No. CK59791)

GLORIA G.,

Petitioner,

v.

THE SUPERIOR COURT OF  
LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT  
OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

Petition for Extraordinary Writ. Marilyn H. Mackel, Temporary Judge.  
(Pursuant to Cal. Const., art. VI, § 21.) Writ denied.

Rafael Venegas for Petitioner.

No appearance for Respondent.

Raymond G. Fortner, Jr., County Counsel, and William D. Thetford, Senior Deputy County Counsel, for Real Party in Interest.

Gloria G. (mother) petitions for an extraordinary writ directing the juvenile court to vacate its findings and orders sustaining a Welfare and Institutions Code<sup>1</sup> section 342 petition related to her children Andrea G.<sup>2</sup> and Ezekiel G., terminating reunification services, and setting a permanent plan hearing under section 366.26. Her request for extraordinary relief is based upon her contention that there was insufficient evidence to sustain the section 342 petition -- which alleged that she physically abused Ezekiel -- because the court's findings were based upon hearsay statements by Ezekiel that were not reliable. That contention fails because she did not object to the hearsay statements, and because the court's findings were not based solely on the hearsay statements. Thus, the juvenile court's reliance upon Ezekiel's statements in sustaining the section 342 petition was appropriate under section 355 and *In re Lucero L.* (2000) 22 Cal.4th 1227 (*Lucero L.*). Accordingly, we deny the petition for extraordinary writ.

## **BACKGROUND**

Andrea and Ezekiel were detained by the Los Angeles County Department of Children and Family Services (the Department) in June 2005, when they were six years old and one and a half years old, respectively. In a petition filed under section 300, the Department alleged that on June 23, 2005 and on prior occasions,

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<sup>1</sup> Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

<sup>2</sup> We use Andrea's given name in this opinion, although we understand that the family refers to her as Destiny.

mother left the children with her mother (maternal grandmother) without making appropriate provisions for their ongoing care and supervision. The petition also alleged that mother had a history of substance abuse and that she had inappropriately disciplined Andrea using physical force resulting in injury.<sup>3</sup>

Mother submitted to the section 300 petition and the juvenile court sustained all counts. The court ordered a case plan that included a minimum of six months in an in-patient drug rehabilitation program followed by a minimum of six months in an out-patient program, random drug testing, 52 weeks of parent education, individual counseling, and a psychiatric evaluation at least every three months.

At the six-month review hearing (§ 366.21, subd. (e)) in January 2006, the Department reported that mother was in partial compliance with her case plan. She had completed two and a half months of in-patient and three months of out-patient drug treatment and had consistently tested negative for drugs. Although she told the social worker that she had seen her psychiatrist and attended some parent education classes, she did not provide any documentation to show compliance. She was not in compliance with the court's order to participate in individual counseling. The court ordered continued family reunification services for mother and granted the Department discretion to allow mother to have unmonitored visitation with the children. A twelve-month permanency hearing (§ 366.21, subd. (f)) was set for July 19, 2006.

In April 2006, maternal grandmother, with whom the children had been placed, was evicted from her apartment and could not find suitable housing, so the

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<sup>3</sup> The original petition did not allege counts as to either child's father. The Department later filed a section 342 petition as to Andrea's father, Adam A. That petition was sustained, and is not relevant to the issues in this writ proceeding. Ezekiel's father is deceased.

children were placed in foster care. The children ultimately were placed with foster parents Juana N. and Martin N. in May 2006. On July 13, 2006, Andrea was removed from the foster home, at the foster parents' request, because she was showing increasingly aggressive behavior toward Ezekiel. She was placed with her father, Adam.

On July 19, 2006, the date set for the twelve-month permanency hearing, the Department filed a "Last Minute" report in which the case social worker stated she had just received a telephone call from the Foster Family Agency (FFA) social worker, informing her of an incident regarding Ezekiel. The FFA social worker told the case social worker that Juana, the foster mother, took Ezekiel to a doctor after he complained of pain in his genital area. The doctor observed what appeared to be a bite mark on Ezekiel's penis and a "hickey" in his genital area. Ezekiel reportedly told the doctor, "My mommy bite me." The juvenile court ordered the Department to investigate this incident.

Following its investigation, the Department filed a section 342 petition, with three identical counts under section 300, subdivisions (a), (b), and (j), alleging that mother physically abused Ezekiel by biting his penis and by striking and biting his back, and three other counts under section 300, subdivisions (b), (d), and (j), alleging that mother sexually abused Ezekiel by biting his penis. In its detention report filed that same day, the Department set forth the statement that Juana, the foster mother, gave regarding the incident. Juana told the case social worker that mother had an all-day visit with Ezekiel on July 17. Mother picked Ezekiel up at a designated meeting place at about 7:40 a.m., and returned him at about 6:45 p.m. that same day. Juana's husband, Martin, picked Ezekiel up at the meeting place, and noticed that he appeared to have been crying. When Juana changed Ezekiel's diaper that night, she noticed that his penis was red, but she thought it was just a rash. She asked him what happened, and he said, "My

mommy” while making a biting gesture, and “Mommy bite me. Mommy bite.” She told him, “You loco, Ezekiel,” and put cream on him. The next day, his penis was worse. He continued to say, “Mommy bite me,” and he cried and did not want to walk. Juana called the doctor’s office, but the office was closed, so she made an appointment for the following day. When mother called Ezekiel a few days later, he cried when he heard her voice. Juana heard mother say to him, “I’m not gonna bite you again, Zeke. I’m not gonna hit you no more. I want you to come home with me.” Ezekiel touched his penis and said, “Mommy, you hurt me, mommy.”<sup>4</sup>

In addition to Juana’s statement, the report includes several other statements by social workers and by Andrea’s father relating Ezekiel’s repeated statements that mother bit and hit him. For example, FFA social worker Lourdes Pena stated that Ezekiel told her on July 20, 2006 that his penis hurt because “Mommy bite me” and said that he did not want to visit mother. The ER-CSW, Siyeon Kim, stated that when she interviewed Ezekiel on August 4, he said “Mommy bite me” while pointing to his penis. Kim also observed bruising on his penis and a bite mark surrounding the birthmark on his back. Andrea’s father stated that during a telephone call between Andrea and Ezekiel on July 24, Ezekiel said, “Sissy, mommy punch me and hit me and bite my pee-pee.”

The Department also attached to the detention report the report by the SCAN Evaluator who examined Ezekiel on July 28. That SCAN report documented the injuries to Ezekiel and noted that Ezekiel said, “My mommy bite me” and “Mommy hurt me here” when explaining what happened to his penis. Ezekiel also told the evaluator that mother hit him.

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In addition to the injury to his penis, Juana reported that there was what appeared to be a bite mark on Ezekiel’s back.

In addition to these statements, the Department reported that mother told ER-CSW Kim that she did not inflict the injuries on Ezekiel. She said that she was never alone with him during the visit on July 17, and that he does not call her “mommy.” She also said that Ezekiel calls her “mom” and calls Juana “mommy.” After further investigation, the Department determined the latter to be untrue: Ezekiel addresses Juana as “Juana.”

Finally, the Department contended it was not possible that Ezekiel had been coached to say that mother bit him. It noted that Ezekiel’s statements were consistent throughout repeated interviews, and that it is unlikely for a child his age to lie. It also noted that Andrea had made a statement reported in the initial detention report, which was filed when the case began more than a year earlier, that suggests that mother had bitten her children in anger on previous occasions. At the time of the original detention in June 2005, Andrea told the case social worker that mother had slapped and scratched her, and then said, “I don’t want my mom to hit me or bite me.”

In the jurisdiction/disposition report filed a month later, the Department included summaries of interviews with mother, maternal grandmother, a maternal aunt, and the doctor who examined Ezekiel on July 19.

Mother said that she picked Ezekiel up on July 17 at around 7:30 a.m. and took him to maternal grandmother’s home, where maternal grandmother and maternal aunt took care of him while she slept for a few hours. At 10:30 a.m., they all drove to an AA meeting, during which mother took Ezekiel to the bathroom. She and her mother checked Ezekiel for bruises or marks, as they always do, and there were no marks on him. Before they left the meeting at 1:30 p.m., maternal grandmother changed Ezekiel’s diaper. Juana called mother at around 5:00 p.m., and mother told her that she would bring Ezekiel back at around 7:30 or 8:00 p.m.

When Martin arrived to pick him up, Ezekiel ran to him; Ezekiel was smiling and kissed mother goodbye.

Maternal grandmother said that mother brought Ezekiel home before 8:00 a.m. the morning of July 17. Maternal grandmother changed his diaper before they left for the meeting, and his penis was normal. She also changed his diaper at the meeting, right before they left, and again after they returned home, before mother took him back to the foster parents. She did not remember whether mother ever changed his diaper that day. She said that Ezekiel looked and acted normal all day.

Maternal aunt said that mother brought Ezekiel home that morning and slept for a while until they left to go to the meeting. She said that Ezekiel never left their side during the meeting, and seemed fine all day. She thought that both mother and maternal grandmother took Ezekiel back to the foster parents as soon as they got home from the meeting, although she was not certain. She also said that mother called Ezekiel a few days later, and she heard mother ask Ezekiel who hurt him. She could hear Ezekiel make a noise, and she thought he was going to say “Juana,” but then he screamed as if someone pinched or hit him, and Juana ended the call.

The doctor, Dr. Pleitez,<sup>5</sup> stated that she examined Ezekiel on July 19, and observed a bruise on his penis that resembled a human bite mark, and bruises on the left side of his face, on his left lower back, and on the back of his left arm. When she asked him about the injury to his penis, he said “Mommy.” She asked him several times, and he consistently said “Mommy” and made a biting gesture. He also said “Mommy hit” while putting his hand on the left side of his face. Dr. Pleitez “strongly believed” that Ezekiel was injured by mother and was not

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The report misspells the doctor’s last name as Plietez.

coached. She explained that it would be very difficult for a child his age to tell a story so persistently and to repeat the same story, because he would tend to forget.

The adjudication hearing on the section 342 petition and the twelve-month permanency hearing were continued several times over the next several months. The Department filed several reports during that time, providing further information about the July 17 incident and mother's compliance with her case plan.

The Department reported that Juana was asked whether Ezekiel's injury could have been inflicted by another child in her home. She responded that it was not possible, because the three other foster children in the home had just been placed there on July 17 and had spent the entire evening in their room without any interaction with Ezekiel. She told the social worker that Ezekiel spent the evening playing with her 18 month old son, and was supervised the entire time.

Juana's husband Martin was asked about a telephone call mother made two days after her visit on July 17. Martin monitored the call, which was on a speaker phone. He told the social worker that Ezekiel said to mother, "Mom, you bite me," to which mother responded, "I love you." Martin also said that mother asked Ezekiel four or five times who had bitten him before she said, "I'm not gonna do it again. I'm not gonna bite you again. I'm sorry, I love you."

The Department also reported that mother was not in compliance with her case plan. It noted that the only part of the plan with which she was in full compliance was the order for random drug testing. It recommended that family reunification services be terminated and that a section 366.26 permanent plan hearing be set.

The adjudication hearing on the 342 petition was held over four days, beginning January 22, 2007. The Department presented as witnesses Dr. Pleitez, Juana N., and Connie Woodland, the supervising social worker assigned to the case.



Dr. Pleitez testified that she observed bruising and teeth marks on Ezekiel's penis and upper arm when she examined him on July 19, 2006. Based on the size of the teeth marks on the penis, the doctor believed it was an adult bite. She also observed bruising on Ezekiel's torso and legs. All of the bruises appeared to be recent. She asked Ezekiel several times how he got his injuries, and each time he said that "Mommy" did it while making a biting motion. She testified that, based upon her 22 years of experience as a pediatrician, she believed that children Ezekiel's age are too young to coach as witnesses because they are too spontaneous.

Juana N.'s testimony was consistent with her statement set forth in the detention report filed with the 342 petition, although it was more detailed. She explained that she thought Ezekiel just had a diaper rash when she changed his diaper after his visit with mother on July 17, so she put cream on him. She did not notice whether the rash was worse the next morning because there still was cream on him when she changed his diaper; she just put a new diaper on him and got him dressed. She had to go to the mall that day to bring some other foster children to a visit with their mother, so she brought Ezekiel with her.<sup>6</sup> Ezekiel cried the entire time they were at the mall, except when he was sitting down and eating. When they got home at around 4:30 p.m. and she changed his diaper, the cream was gone and she could see that his penis was purple. She called the FFA social worker, who told her to take him to the doctor. By that time, however, the doctor's office was closed, so she made an appointment to take him in the following morning. The doctor examined him and told Juana to file a police report, which Juana did.

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<sup>6</sup> She testified that those foster children had been placed with her at 3:00 p.m. the previous day (July 17), and they had no interaction with Ezekiel after he got home following his visit with mother.

The day after she took Ezekiel to the doctor and filed the police report, Juana took pictures and a video of Ezekiel because she thought mother might accuse her of having inflicted the injuries. The pictures and video were admitted into evidence at the hearing without objection by mother. The video shows Ezekiel, undressed, standing before the camera and being asked by a female voice what happened. Ezekiel makes a hitting gesture toward his right cheek and says, “My mom,” then points to his penis and says “My mom” repeatedly while making a biting gesture. Later, the female voice asks him if he wants to go to mother. He looks upset and shakes his head “no.” When she asks him why, he says, “She hit me.”

Juana testified that whenever Ezekiel was asked about what happened, he said “Mommy” and made a biting motion. She also testified that Ezekiel’s penis was normal when she changed his diaper before he went for his visit with mother on July 17, and that Ezekiel was never alone with her son (who was 16 months old at the time of the incident), or with the other foster children in her home, from the time he returned from the visit until he saw the doctor.

Social worker Connie Woodland testified that she was present during Ezekiel’s first visit with mother following the July 17 incident. She was told by the social worker who accompanied Ezekiel to the visit that Ezekiel was in such distress on the way there that they considered requesting that the visits with mother be suspended. Ezekiel was cautious and stand-offish at the beginning of the visit, but he eventually seemed less fearful and allowed mother to play with him. On the way to and during the next visit, Ezekiel was calm, but he “just fell apart” at the end of the visit. He was screaming and was “absolutely uncontrollable”; it required Woodland and two other social workers to get him into his car seat to go home. Woodland was told that he screamed and cried the entire hour-long drive home, and tried to fight with the other boys in the house once he got home.

Woodland also testified that Ezekiel was removed from Juana's home in late September 2006 due to injuries he sustained in August and September. He bruised his cheek in August when he fell while jumping on the bed, and he scraped his cheek in September when he fell off a scooter or tricycle. After investigating the injuries, she concluded there was so much activity and rough housing in the home, which at the time had five very active young boys, that Juana could not always intervene to prevent injuries. She believed that Ezekiel would be better off in a home with fewer children. She testified that she was not aware of any report of abuse or neglect regarding Juana or any of the children in her care, and said that the Department continues to place children with Juana.

Mother and maternal grandmother testified on mother's behalf. Mother's account of her visit with Ezekiel on July 17 was partly consistent and partly inconsistent with the account she gave to the social worker on August 23 (as reported in the jurisdiction/disposition report filed on Sept. 25). Although the earlier report stated that she told the social worker that Juana called her at 5:00 p.m. on July 17, she testified at the hearing that there was no such call.<sup>7</sup> Instead, she said that she called Juana between 7:30 p.m. and 8:00 p.m. to arrange the drop off. She drove Ezekiel to the meeting place by herself and waited about 10 minutes for Martin to arrive.

Mother also testified about a visit she had with Ezekiel on September 21 that was monitored by the case social worker, Donna Scheweiker, and another social worker. At one point during the visit, she changed Ezekiel's diapers and saw

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Juana testified that she called mother at 5:00 p.m. because mother was supposed to return Ezekiel at that time but she was not at the meeting place. Mother denied that there was a set time for her to return Ezekiel to the meeting place.

bruises on him. They asked him what happened. Mother testified that Ezekiel said that Juana had done it to him.<sup>8</sup>

Maternal grandmother testified she changed Ezekiel's diaper several times on July 17, including once right before mother took him back to the foster parents that evening, and she did not notice any bruises or unusual marks on him. She said that the only time mother was alone with Ezekiel that day was when mother took him to the bathroom at the AA meeting, although she also testified that mother was unaccompanied when she brought Ezekiel back to the foster parents.

The juvenile court sustained the section 342 petition in part. The court stated it had reviewed all of the documents admitted into evidence, as well as the video of Ezekiel, several times. The court noted there was no evidence to suggest that Ezekiel's injuries were caused by Juana, Martin, or any of the children in their home. Rather, the court explained, there was evidence that the injury occurred after mother left maternal grandmother's home to return Ezekiel to the foster parents. The court also noted there was evidence that mother had a history of violent impulsive behavior. The court sustained the counts of the petition alleging physical abuse but dismissed the counts alleging sexual abuse, finding there was no evidence of a sexual motive. Turning to the twelve-month permanency hearing, the court found no basis to continue reunification services or to return Ezekiel to mother's care and custody. It terminated services and set the matter for a section 366.26 permanent plan hearing for both children. Mother challenges these rulings in this writ proceeding.

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<sup>8</sup> Scheweiker testified in rebuttal that Ezekiel never said the name Juana during the September 21 visit. When she asked him how he got hurt, he said, "scooter."

## DISCUSSION

### A. *Section 342 Petition*

Mother contends there was insufficient evidence to sustain the section 342 petition because the juvenile court relied upon hearsay statements. Although mother acknowledges that section 355<sup>9</sup> and *In re Malinda S.* (1990) 51 Cal.3d 368 allow the court to admit hearsay statements and find jurisdiction based upon that hearsay, she argues that reliance upon Ezekiel's statements in this case was improper because they were the product of undue influence and because they lacked the requisite indicia of reliability under *Lucero L., supra*, 22 Cal.4th 1227, and *In re Cindy L.* (1997) 17 Cal.4th 15 (*Cindy L.*). Mother's contention fails for several reasons.

First, mother failed to object to the admission of Ezekiel's statements.<sup>10</sup> "It is well settled that hearsay or other incompetent evidence . . . if received without proper objection or motion to strike is to be regarded as competent evidence in support of an order or judgment." (*Flood v. Simpson* (1975) 45 Cal.App.3d 644, 649.) Thus, we must affirm the juvenile court's order because it is supported by substantial evidence -- Ezekiel's statements that mother bit him, among other

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<sup>9</sup> Section 355 provides that hearsay statements contained in reports filed by the Department with the juvenile court are "admissible and constitutes competent evidence upon which a finding of jurisdiction pursuant to Section 300 may be based" unless certain exceptions apply. (§ 355, subd. (b).)

<sup>10</sup> Mother's counsel stated during his closing argument at the hearing on the section 342 petition that he believed he made a proper hearsay objection at the time the petition and detention report were filed (in Aug. 2006). No such objection appears in the record, however, but even if it did, there is no indication that counsel objected to hearsay statements contained in subsequent reports. Moreover, the juvenile court specifically asked counsel at the hearing whether there was any objection to the evidence offered by the Department -- which included the August 2006 detention report as well as other reports and the video of Ezekiel -- and counsel responded, "No, Your Honor."

evidence, to which no objection was interposed -- even if that evidence was otherwise inadmissible. (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113 [“If there is any substantial evidence, contradicted or uncontradicted, which will support the judgment, we must affirm. This is so even if the judgment is supported by incompetent or otherwise inadmissible evidence admitted without objection”].)

Second, the juvenile court impliedly rejected mother’s argument at the close of the hearing on the section 342 petition that Ezekiel was coached to say that mother bit him. As the court noted when it made its findings, Ezekiel was remarkably consistent in his statements regarding how he was injured. Indeed, there was evidence that over the course of several weeks he told Juana, Dr. Pleitez, Andrea, the SCAN evaluator, every social worker to whom he spoke, and even mother herself the exact same thing: “Mommy bite me.” Dr. Pleitez, a pediatrician with 22 years experience, testified that a child his age is too spontaneous to be coached to tell the same story repeatedly. Thus, even if mother’s argument at the close of the hearing constituted a proper objection to the admission of Ezekiel’s statements, there was substantial evidence to support the court’s implied finding that the statements were not the product of undue influence.

Third, under *Lucero L., supra*, 22 Cal.4th 1227, the juvenile court was not required to determine whether the circumstances provided sufficient indicia of reliability in order to consider Ezekiel’s hearsay statements, because the court did not rely exclusively on those statements in making its jurisdictional findings. As mother correctly notes, the Supreme Court in *Cindy L., supra*, 17 Cal.4th 15, held that certain requirements must be met before a child’s hearsay statements may be admitted in a dependency case under a “child dependency exception” to the hearsay rule. One of those requirements is that “the court must find that the time, content and circumstances of the statement provide sufficient indicia of reliability.” (*Id.* at p. 29.)

But the Supreme Court subsequently noted in *Lucero L.* that *Cindy L.* did not address the applicability of section 355, which was amended after the trial court’s decision in that case. The Court concluded that, with the amendment of section 355, “hearsay statements contained in social studies<sup>[11]</sup> should be admissible even if they do not meet the requirements of the child dependency exception and even if the minor is incompetent to testify.” (*Lucero L., supra*, 22 Cal.4th at pp. 1242-1243.) The Court held, however, that although the statements are admissible, they cannot *by themselves* constitute substantial evidence to support a jurisdictional finding unless the juvenile court makes the reliability finding required under the child dependency exception. (*Id.* at pp. 1247-1248; see also *id.* at pp. 1244-1245 [noting that reliance on “‘hearsay evidence *alone*’” violates due process except where reliability is established], italics added; *id.* at p. 1245 [“the inclusion of hearsay statements in a social study does not cure the due process problem inherent in *solely* relying on the out-of-court statements of a minor unavailable for cross-examination”], italics added; *id.* at pp. 1245-1246 [“Although there is nothing unconstitutional about allowing the minor’s hearsay statements to be admitted in a jurisdictional proceeding, subject to exclusion only on grounds of fraud, deceit, or undue influence, a serious due process problem is raised by permitting, as section 355, subdivision (c)(1)(B) does, *sole* reliance on such statements without any particular indications of the statements’ reliability”], italics added.)

In the present case, the juvenile court did not rely solely on Ezekiel’s hearsay statements in sustaining the section 342 petition. In ruling on the petition,

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<sup>11</sup> A social study is “any written report furnished to the juvenile court and to all parties or their counsel by the county probation or welfare department in any matter involving the custody, status, or welfare of a minor in a dependency proceeding.” (§ 355, subd. (b)(1).)

the court stated that its ruling was based upon the consistency of Ezekiel's statements regarding how he was injured as well as "the timing of the injuries." Substantial evidence supports the court's conclusion that the timing of the injuries establishes mother's responsibility for Ezekiel's injuries. Maternal grandmother testified that Ezekiel had no bruises or marks when she changed his diaper shortly before mother took him back to the foster parents. Mother and maternal grandmother both testified that mother drove him to the meeting place by herself. Juana testified that Ezekiel's penis was red when she changed his diaper that night and that he did not have any unsupervised contact with her 16-month old son or the other foster children in her home that evening. In addition to this evidence, there was other evidence that corroborates Ezekiel's statements that mother bit him: Andrea made a statement to a social worker a year before this incident that indicates mother had bitten her in anger previously, and Dr. Pleitez testified that she observed adult bite marks on Ezekiel's penis when she examined him shortly after the incident. In light of this evidence, the juvenile court was not required under *Lucero L.* to make findings regarding the reliability of Ezekiel's hearsay statements.

**B. *Termination of Reunification Services***

Mother argues she was entitled to further reunification services if, as she contends, there was insufficient evidence to support the juvenile court's jurisdictional findings. Because we have found there was sufficient evidence to support those findings, mother's argument necessarily fails.



**DISPOSITION**

The petition for extraordinary writ is denied.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.